CLASSES OF AMERICAN RELIGIOUS CORPORATIONS.

THE right of churches to incorporate has been universally conceded in the United States, except in Virginia and West Virginia, under whose constitutions the legislature is forbidden to grant any "charter of incorporation" to "any church or religious denomination."[1] Nor is such concession a recent one. Churches have exercised corporate rights from the earliest period of the American law. The forms under which this has been done, however, have been quite dissimilar. Five distinct classes of corporations are discernible, the first of which is entirely extinct, the second survives only in an altered form, the third is limited in area, while the fourth and fifth divide the states between them. These five forms in the order mentioned are: (1) The Territorial Parish; (2) The Corporation Sole; (3) The Roman Catholic Church; (4) The Trustee Corporation; (5) The Corporation Aggregate. In addition to these classes some states recognize churches which have done nothing but organize into voluntary societies, as quasi corporations. It is now in order to consider the various forms of church corporations separately.

1. *The Territorial Parish.*

When the United States Constitution was adopted, most of the original thirteen states had established churches, known by different names, but generally called territorial parishes. Massachusetts is an extreme example of this. Here the congregational form of worship was established, and so deeply rooted, that a half century went by after the Revolution before the church was finally disestablished. Complete records of the slow process by which this end was achieved are preserved in the early Massachusetts reports. The development in Maine was quite similar to that in Massachusetts though the records of it are not so complete. In other states, such as Connecticut, the early reports afford but glimpses of the process of disestablishment.

Originally the various towns in colonies organized on the township basis had ecclesiastical powers and duties. The same officers, as town officers, administered ecclesiastical and mundane affairs. They provided for religious instruction and vindicated both ecclesiastical and town rights in one action.[1a]

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[1] Constitution of Virginia, Art. 4, Sec. 59. Constitution of West Virginia, Art. 6, Sec. 47.

[1a] Alna v. Plummer, 3 Me. 88.

This system was soon found to be inconvenient. Towns were often of a size too large for one church, and too small for two. It might be practically impossible for all of its inhabitants to worship at one place. The best point for the location of a church might be at or near the boundary line of two towns. Under these circumstances territorial parishes became a necessity. These might be coextensive with a town, or they might comprise a part of the territory of a town, or they might even comprise portions taken from two or more towns.[2] They might be larger or smaller than a town. But whatever their form or size they were corporations distinct from the parent town or towns. Town and parish would subsist together and act apart under the management of different officers.[3] Land formerly held by the towns in their parochial character would pass to the parishes, as soon as they were formed.[4]

And these parishes were as much public corporations as towns and school societies.[5] "Provision for the support and maintenance of religious instruction and worship was considered to be a duty resting on the state, as much as the promotion of general education, the support of the poor, or the maintenance of roads and bridges; and that provision was made and carried into effect through the instrumentality of local ecclesiastical societies established by the state through its legislative power, as those other objects respectively were accomplished through the agency of school societies, and districts, and of towns. Each of these societies, or communities, were considered to be, and were in fact, municipal, public, political corporations. They were governmental instrumentalities, composed of individuals, as component parts of the great community, for the promotion of the general welfare of that community and in which no person had an interest, or was to derive a benefit of a character particular or individual to himself merely, but only in connection with, and as he participated in, the welfare of the community generally."[6]

It followed that the legislature had complete control over them. It might divide, merge or extinguish the various parishes at its mere pleasure without petition or preliminary action on the part of any-

[2] Dillingham v. Snow, 5 Mass. 547.

[3] Dillingham v. Snow, 3 Mass. 276, 282.

[4] Milton v. First Parish in Milton, 27 Mass. (10 Pick.) 447; Medford v. Pratt, 21 Mass. (4 Pick.) 222; Medford v. Medford, 38 Mass. (21 Pick.) 199; Tobey v. Wareham Bank, 54 Mass. (13 Met.) 440; First Parish in Sudbury v. Jones, 62 Mass. (8 Cush.) 184; Lakin v. Ames, 64 Mass. (10 Cush.) 198; Sewall v. Cargill, 15 Me. 414.

[5] First Society of Waterbury v. Platt, 12 Conn. 180.

[6] Second Ecclesiastical Society of Portland v. First Ecclesiastical Society of Portland, 23 Conn. 255, 272.

body.[7] No person, who happened to be a resident of the territory covered by such a parish, could be anything but a member of it. Membership attached to residence in a parish the same as citizenship attaches to residence in a city.[8] "It was a fundamental principle that every person should contribute toward the support of public worship somewhere, be a member of some religious society and that he never could leave one but by joining another."[9] When independent societies developed and persons were allowed to separate their connection with the territorial parish, such right of separation was considered as a privilege, and all the forms of law had to be strictly observed.[10] Even if he had actually in due form of law separated his connection with the parish by joining an independent society, he would, on leaving that society again, without more, become a member of the territorial parish.[11] Nor had the territorial parish any power to excommunicate a member, however much such a result might be desired. While it could investigate and ascertain who was a member, such investigation was an inquiry into an existing fact. It could not, under the guise of such an inquiry, change its membership.[12]

And such membership carried with it all the consequences, agreeable and disagreeable, which residence in a town or county implied. Residents of a county or town under the law were liable for its debts. A person who recovered judgment against these public corporations could levy execution against the property of any of their citizens. A strong inducement was thus presented to every citizen to keep his county or town out of debt. This doctrine, harsh as it was, applied also to territorial parishes.[13]

Since these parishes were thus in every sense public corporations, it followed that their officers were public officers[14] capable as such of administering oaths.[15] It further followed that the corporation could take property by eminent domain,[16] and tax those who had property within its limits, whether they were residents or non-resi-

[7] Thaxter v. Jones, 4 Mass. 570; Colburn v. Ellis, 7 Mass. 89; First Society of Waterbury v. Platt, 12 Conn. 180.

[8] Osgood v. Bradley, 7 Me. 411; Kingsbery v. Slack, 8 Mass. 154.

[9] First Parish of Sudbury v. Stearn, 38 Mass. (21 Pick.) 148, 152.

[10] Jones v. Carry, 6 Me. 448.

[11] Oakes v. Hill, 27 Mass. (10 Pick) 333; Lord v. Chamberlain, 2 Me. 67.

[12] Keith v. Howard, 41 Mass. (24 Pick.) 292.

[13] Chase v. Merrimack Bank, 36 Mass. (19 Pick.) 564, 31 Am. Dec. 163; Richardson v. Butterfield, 60 Mass. (6 Cush.) 191; Fernald v. Lewis, 6 Me. 264.

[14] First Parish of Sherburne v. Fiske, 62 Mass. (8 Cush.) 264, 54 Am. Dec. 755.

[15] Chapman v. Gillet, 2 Conn. 40.

[16] Taylor v. Public Hall Co., 35 Conn. 430.

dents, natural or artificial persons, believers or unbelievers.[17] Thus a manufacturing corporation was forced to pay parish taxes though it contended that since it had no soul, it could have no benefit from an institution established *pro salute animae*.[18]

While this power of taxation was not unlimited[19] it nevertheless constituted the death germ of the territorial parish. More and more exceptions to it were made till eventually the exceptions became the rule. When this stage had been reached statutes or constitutional amendments were enacted abolishing the territorial parish altogether. The process by which, through constitutional amendments, statutes and court decision, church and state were divorced, territorial parishes abrogated and "poll parishes" substituted in their place is a very interesting one and would furnish a splendid subject for an historical essay. It is not however within the purview of the present article. Suffice it to say, that at the present time no such territorial parish appears to have any existence in the United States.

2. *The Corporation Sole.*

Closely connected with and dependent on the territorial parish in some states, and independent of it in others, we find another form of religious corporation, namely the corporation sole. This legal entity consists of one person at a time. When that person dies, his successor in the particular office or station in relation to which the corporaion was created assumes his duties and privileges. The King of England is an example of such a sole corporation. So also was a minister of a parish in some of the original colonies, which had adopted the congregational form of worship, such as Massachusetts. Says the court in an early Massachusetts case: "When a minister of a town or parish is seized of any lands in right of the town or parish * * * the minister for this purpose is a sole corporation and holds the same to himself and his successors."[20]

This corporation was thus constituted solely for the purpose of holding property in right of the parish. On the death of the corporator the fee would be in abeyance till his successor was elected. This successor would thereupon relieve the parish from the custody

[17] Lord v. Marvin, 1 Root 330; Hosford v. Lord, 1 Root 325; Turner v. Burlington, 16 Mass. 208. Hundreds of cases could be cited in support of the general power of taxation possessed by these parishes. None of these cases, however, decided the question directly. The general power to tax was regarded as such an elementary proposition that no one ever seems to have denied it.

[18] Amesbury Nail Factory Co. v. Weed, 17 Mass. 53.

[19] Bangs v. Snow, 1 Mass. 181.

[20] Inhabitants of the First Parish of Brunswick v. Dunning, 7 Mass. 435, 447.

and usufruct of the property which it had enjoyed during the interim. While the minister alone could make a valid conveyance, good for such time as he remained in office, if more was desired, the consent of the parish must be obtained. An attempt by the parish only to alienate was absolutely futile, for if there was a minister the fee was in him, and if there was a vacancy, the fee was in abeyance, and a corporation could not acquire a freehold by a disseisin committed by itself.[21] It followed that the parish could not even convey the ministerial lands to the minister himself, so as to make a title derived through the will of such minister good against his successor.[22]

This Massachusetts doctrine was followed in other congregational states such as Maine.[23] In states which had adopted the episcopal form of worship, such as Virginia[24] and Georgia,[25] the corporation sole appears to have been the only corporate body in control of the church property. Still other states, such as New Hampshire, never recognized the corporation sole.[26]

It is obvious that this form of corporation, when it depended on the territorial parish as in Massachusetts and Maine, became useless when the territorial parish was succeeded by the voluntary religious society. In these states it disappeared without any struggle, though the territorial parish itself died hard.

In episcopal states, however, particularly Virginia, the process of elimination was not so simple. After a great many contradictory statutes relative to religion had been enacted in this state, a law was passed in 1802 which vested all the lands then held by episcopal ministers under the old order in the overseers of the poor, after the "present incumbent" had died or had been removed in some other way. This law was upheld by a lower court. When the case came before the Supreme Court, the court stood three to two for a reversal of the judgment. The night before the decision was to be announced one of the three judges in the majority died, so that now the court stood evenly divided and the judgment of the lower court and the constitutionality of the statute were upheld.[27] Though this decision was an accident, it stood as the law of Virginia for thirty-six years without any attempt to reverse it. Not till 1840 was the question again raised in the Supreme Court. The court however

[21] Weston v . Hunt, 2 Mass. 500; see also Brown v. Porter, 10 Mass. 93.
[22] Austin v. Thomas, 14 Mass. 333.
[23] Bucksport v. Spofford, 12 Me. 487.
[24] Terrett v. Taylor, 13 U. S. (9 Cranch) 43.
[25] Christ Church v. Savannah, 82 Ga. 656.
[26] Baptist Society in Wilton v. Wilton, 2 N. H. 508.
[27] Turpin v. Locket, 6 Call (Va.) 113.

now preferred to follow its former decision because of the long acquiescence of all concerned in it, the recognition the decision had received from all the branches of the government, and the fact that most of the church land had now been alienated under it.[28]

Of course the statute did not dissolve the corporation sole till the death of the present incumbent. Attempts on the part of overseers of the poor to seize property of churches before that event had taken place were therefore very properly enjoined.[29] After the incumbent's death, however, the corporation was absolutely at an end, the only reason for its existence having been removed. It is obvious that however lovingly parishioners might cherish their minister in order to obtain the benefits of the glebe lands as long as possible they could not keep him alive forever. Automatically, one after another, the ancient church lands were taken over by the state at the death of the respective ministers. The last were probably taken over at or about the time of the civil war. None certainly remain at the present time.

But while the old form of corporation sole has thus passed away with the system of religious establishment of which it was a part, a new form of it has sprung into being and is vigorously flourishing today. Some churches in this country object to lay management of their temporal affairs. They aim to concentrate this management in the bishop or the priest. Pressure has therefore been brought to bear upon the various legislatures to make bishops corporations sole, and thus obviate the embarrassment experienced from lay trustees. This application has not always been successful. Legislatures have leaned against it, believing that the Roman Catholic Church, which would be the main beneficiary of such a law, was asking for an undue privilege.[30] In other states no such legislation appears to have been asked and a bishop or priest has hence been held not to possess corporate rights.[31] In still other states the decisions go so far the other way as to create a quasi corporation sole without any express legislative authority.[32] In probably most states however the question is now settled by statutes authorizing bishops of various denominations to become corporations sole by complying with certain pre-

[28] Selden v. Overseers of Poor, 11 Leigh 127.

[29] Young v. Pollock, 2 Munf. 517 note, Claughton v. Macnaughton, 2 Munf. 513; but see Overseers of Poor v. Hart, 3 Leigh 1.

[30] Union Church v. Sanders, 1 Houst. (Del.) 100, 63 Am. Dec. 187.

[31] M'Girr v. Aaron, 1 Pen. & W. (Pa.) 49; Dwenger v. Geary, 113 Ind. 106, 14 N. E. 903.

[32] St. Antonio v. Odin, 15 Tex. 539; Santillan v. Moses, 1 Cal. 92; Beckwith v. St. Philip's Parish, 69 Ga. 564.

scribed conditions,[33] which are usually extremely simple, consisting merely of the filing of some statement, certificate or affidavit with a certain officer. Their purpose is to afford public notice of the existence of the corporation. A Mormon bishop who had failed to comply with the statute has therefore been denied the right to act as a corporation sole.[34]

While corporations sole are thus recognized under the statutes of the various states a somewhat similar recognition is given to the Pope at Rome under a treaty of the United States. This brings us to the third form of religious corporation in the American Law.

3. *The Roman Catholic Church.*

The Roman Catholic Church is recognized by the courts as a corporation—but only in our island possessions—by the treaty of Paris which concluded the Spanish-American war. This treaty contained an article declaring that the cession of the Philippines, Porto Rico and other territory "cannot in any respect impair the property or rights which by law belong to the peaceful possession of property of all kinds of * * * *ecclesiastical* or civic *bodies* * ** having legal capacity to acquire and possess property in the aforesaid territories."[35] It was soon found that by the Spanish law then in force in these islands the Roman Catholic Church was an ecclesiastical body and had a juristic personality and legal status.[36] There was nothing for the courts to do but to recognize it as a corporation, allow it to sue and be sued, and give it the protection provided for by the treaty.[37] It has therefore been said that the contention that the Catholic Church is not a corporation in these islands did not require serious consideration being "made with reference to an institution which antedates by almost a thousand years any other personality in Europe and which existed 'when Grecian eloquence still flourished in Antioch, and when idols were still worshipped in the temple of Mecca'."[38] It follows that so far as our island possessions are con-

[33] Mora v. Murphy, 83 Cal. 12, 23 Pac. 63; State v. Getty, 69 Conn. 286, 37 Atl. 687; Searle v. Roman Cath. Bishop of Springfield, 203 Mass. 493, 89 N. E. 809; Chiniquy v. Catholic Bishop of Chicago, 41 Ill. 148; Daly v. Catholic Church, 97 Ill. 19; Kennedy v. LeMoyne, 188 Ill. 255, 58 N. E. 903; Tichenor v. Brewer's Executor, 98 Ky. 349, 33 S. W. 86; Gump v. Sibley, 79 Md. 165, 28 Atl. 977.

[34] Blakeslee v. Hall, 94 Cal. 159, 69 Pac. 623.

[35] Treaty of Paris, Article 8, cited in Ponce v. Roman Catholic Church, 210 U. S. 296, 310.

[36] Ponce v. Roman Catholic Church, 210, U. S. 296, 319.

[37] Santos v. Roman Catholic Church, 212 U. S. 463; Ponce v. Roman Catholic Church, 210 U. S. 296.

[38] Barlin v. Ramirez, 7 Philippines 41, 58.

cerned the Roman Catholic Church with the Pope at Rome as its president will be recognized by all the branches of the government as a corporation. Negotiations carried on at Rome with the Pope by a special agent of the President of the United States in regard to a disposal of some of the vast holdings of that church are therefore entirely proper from any viewpoint whatsoever.

The scope of this recognition, however, does not extend further than to territory covered by the treaty. As to all other parts of the United States the Catholic Church as such is not a corporation but an hierarchy. A contention that it can own property as such is an "inconceivable assumption." As a sovereign power, a political and ecclesiastical state, it can acquire property in the various states only "by treaty with the government at Washington."[39]

The three forms of church corporations so far considered are not native products of the American soil. The first two were imported from England and have perished; the territorial parish absolutely, the corporation sole in its original form. The third, the Roman Catholic Church, is a Spanish product, thrust upon us by the treaty of Paris and ill suited to our conditions. It will in the course of time probably share the fate of the territorial parish. The modern form of the corporation sole is the only form of church corporation so far considered which can be called American in the true sense of the word. An extension of the principle of this corporation and an improvement of it is presented by the fourth form of church corporation which we will now scrutinize.

4. *The Trustee Corporation.*

When early in our history territorial parishes began to disintegrate, voluntary societies for religious worship were formed by those who severed their connection with the parishes. These societies generally existed for a time in an unincorporated form. This arrangement worked well enough as long as no property was acquired. When, however, property accumulated the question who was to hold it was at once presented. It could not be held in the name of all the members as they were too numerous and changing. It could not be held in the name adopted by the society as that was not recognized by law. The difficulty was solved by selecting certain persons to hold as trustees for the members of the society. This solution was adequate for the time measured by the life and good behavior of the trustees.

[39] Bonacum v. Murphy, 71 Neb. 463, 493.

Since, however, the trustees took as individuals,[40] if they became obstreperous they were in a position to cause untold difficulties to the society. And when they died, as die they must, the question of their successors might and did cause even greater trouble. Whether the courts adopted the view that their trusteeship was for life only and the fee thereafter reverted to the original owner,[41] or whether they adopted the view that the fee passed to the respective survivors,[42] and after the death of the last survivor to his heirs,[43] the title was liable to get into the hands of men incapable of understanding the needs of the society or, what was even worse, hostile to it. Nothing that the society could do was effective to prevent this result. It could not by the appointment of new trustees terminate the estate of the old board and transfer its title to the property.[44] It retained no power over them and could not after their death elect their successors. At times they might not even be able to tell who were such successors. That they could appeal to the power of equity to remove the trustee and appoint his successor was small consolation, as this involved a lawsuit with all its consequences of embittered feelings, the very thing which churches seek to avoid. The inconvenience of the situation is well illustrated by a Massachusetts case in which the trustee was dead for almost a life-time and the church succeeded in saving its property merely on the doctrine of adverse possession.[45]

It thus became obvious that a system of holding church property by trustees, however well it might work for a time, was not adapted to permanent usefulness. The lives of the trustees were too limited. Something more permanent must be devised. The evil to be corrected was the instability of the trustees. This would very readily be remedied by making the trustees a corporation. This accordingly was done, first by special charter, later by general incorporation statutes. Where there was an existing board of trustees the statute generally incorporated them. If there was no such body some other committee of the church society was selected to act as the corporation. Thus the vestry of a church,[46] its deacons,[47] its rector, vestry-

[40] Follett v. Badeau, 26 Hun. 253.

[41] Morgan v. Leslie, Wright (Ohio) 144.

[42] Peabody v. Eastern Methodist Society, 87 Mass. (5 Allen) 540; Burrows v. Holt, 20 Conn. 459.

[43] Cahill v. Bigger, 47 Ky. (8 B. Mon.) 211.

[44] Lee v. M. E. Church, 193 Mass. 47, 78 N. E. 646; Bundy v. Birdsall, 29 Barb. 31.

[45] First Baptist Church of Sharon v. Harper, 191 Mass. 196, 77 N. E. 778.

[46] Bartlett v. Hipkins, 76 Md. 5, 23 Atl. 1089, 24 Atl. 532; Stubbs v. Vestry of St. John's Church, 96 Md. 267, 53 Atl. 917.

[47] Weld v. May, 63 Mass. (9 Cush.) 181; Anderson v. Brock, 3 Me. 243; Buckingham v. Northrop, 1 Root 53.

men, and wardens,[48] and even the selectmen, clerk and treasurer of towns have been thus incorporated.[49] The policy of the law was "to invest some known and designated officers and functionaries, chosen and set apart according to the constitution and usages of such respective bodies, with corporate powers to take and hold property in succession, in trust for the unincorporated association often fluctuating and varying in numbers and members."[50]

This new corporation bears a striking resemblance to the corporation sole. It is devised upon the same lines of policy. The few represent the many. But while it resembles the sole corporation, it is not a cheap imitation of it but rather a distinct improvement on it. The great fault of the corporation sole is that it and the title resting on it at times must inevitably be in abeyance. The sole corporator cannot live forever. If he dies, some time must elapse before his successor is elected. During this time confusion may ensue. Such a result is not probable with the trustee corporation. This consists of not less than three and may consist of twenty or more members. If one or more dies, others can be elected by the society to fill the vacancy and the corporate succession can thus be kept up indefinitely, without any break whatsoever.

It is also worthy of remark that this trustee corporation added another aspect to the church in whose interest it was created. Before its creation a distinction was made merely between the church and the society. Now the corporation was added. Churches therefore now presented a threefold aspect.[51] The church was the spiritual body of believers over which courts could have no jurisdiction whatsoever; the society consisted of all those who had associated themselves together and who elected the trustees whether they were of the church or not; while the trustees, under whichever name they might be known, and whether they were members of the church or the society or both or neither, were the corporation, created for the express purpose of holding the property of the society.

The society, while it was the reproductive organ of the corporation, creating it and filling vacancies in it, was not a part of it in any sense. It was a segregated body, whose only function was to give birth to certain officers, whom the law thereupon invested with cor-

[48] Montague v. Smith, 13 Mass. 396, 405; Commonwealth v. Woelper, 3 S. & R. 29, 8 Am. Dec. 628; Appeal of Burton, 57 Pa. 213, 25 L. J. 325; In the matter of Howe, 1 Paige (N. Y.) 214.

[49] Trustees in Levant v. Parks, 10 Me. 441; Minister and School Fund v. Kendrick, 12 Me. 381; Warren v. Stetson, 30 Me. 231; Abbott v. Chase, 75 Me. 83.

[50] Earle v. Wood, 62 Mass. (8 Cush.) 430, 450.

[51] Miller v. Trustees of Baptist Church, 16 N. J. L. 251; Lawyer v. Cipperly, 7 Paige (N. Y.) 281; Gray v. Good, 44 Ind. App. 476, 89 N. E. 498.

porate powers. The law took cognizance of its usages in electing such officers and, if an election had been carried on in accordance with them, at once recognized the person elected as a part of the corporation. The theory of the law was not that the societies "select persons to be a corporation, but being chosen to offices recognized by law and usage, the law annexes *proprio vigore* the corporate capacity to the office."[52] Similarly on his removal by death, resignation or otherwise the law *ipso facto* divested the trustee of all power as a corporator and recognized his legally chosen successor.[53] The voluntary society henceforth was recognized only so far as it elected the corporators. In all questions of contract and property the courts looked to the corporation and to the corporation only.

It followed that every contract made by a religious society, in order to be legally binding, must henceforth be either made or ratified by the trustee. Whatever view churches might take of the relation between themselves and their pastor, courts when they were called upon to adjudicate difficulties arising out of it, must apply the ordinary rules of contract. Since the trustees were the only body recognized by the court, a minister, to recover his salary, must show either that his contract was made with the trustees or at least had been ratified by them.[54] Without ratification or assent by the trustees he was not entitled to the pulpit and would be enjoined from ocupying it.[55] If for any reason he forfeited his position, the duty to depose him devolved upon the trustees and not upon the congregation.[56] Since these trustees might be non-members[57] and even persons who had been excommunicated[58] it can readily be seen that they might cause considerable trouble to the congregation when it came to calling or dismissing a minister. It must be said however that, so far as appears from the cases, trustees have caused little actual difficulty in contract matters.

The same however cannot be said when property relations are considered. The trouble caused in this respect is due, not so much to any personal perversity of the trustees, but rather to the inherent defects of the system itself. The trustees are exactly what the word

[52] Bailey v. M. E. Church of Freeport, 71 Me. 472, 477.

[53] Commonwealth v. Green, 4 Whart. 531; Earle v. Wood, 62 Mass. (8 Cush.) 430; Weld v. May, 63 Mass. (9 Cush.) 181.

[54] Miller v. Trustees of Baptist Church, 16 N. J. L. 251; Lawyer v. Cipperly, 7 Paige (N. Y.) 281; Everett v. Trustees of First Presbyterian Church of Asbury Park, 53 N. J. Eq. 500, 32 Atl. 747.

[55] German Reformed Church v. Busche, 7 N. Y. Super. Ct. 666.

[56] Stubbs v. Vestry of St. John's Church, 96 Md. 267, 53 Atl. 917.

[57] Fort v. First Baptist Church of Paris, (Tex. Civ. App. 1899) 55 S. W. 402; In re Walnut Street Presbyterian Church, 3 Brewst. 277, 7 Phila. 310.

[58] Baptist Church v. Witherell, 3 Paige (N. Y.) 296.

indicates. They are trustees. They hold the church property in trust. They occupy substantially the same relation which unincorporated trustees created by deed or will would occupy.[59] Theirs is an estate. While they are entitled to the possession of the church property against the violent and unauthorized acts even of the members of the society which they represent,[60] the latter nevertheless are the beneficiaries and have both the *jus habendi* and the *jus disponendi* for all legitimate purposes,[61] while the trustees have only the bare legal title,[62] and speaking algebraically "are merely x, y and z."[63] Their title is so absolutely apart from all beneficial ownership that an act of the legislature transferring it to another body has been upheld.[64]

It follows that equity has jurisdiction over them. If a trustee misbehaves he can be removed by the court on ordinary equity principles.[65] His actions are under the scrutiny of the court. Any of the beneficiaries if dissatisfied, may invoke the aid of equity,[66] which will thereupon define the trust and restrain any violation of it,[67] and will in proper cases direct the alienation of the trust property and the application of the proceeds of the sale to the trust purposes.[68] A class of litigation was thus developed with which courts are ill equipped to cope. Questions which should be settled by the various societies themselves were dragged into the courts, embarrassing them and inflicting great damage on the society.

But the control which courts thus were forced to assume over the persons of the trustees is not the only evil. Since there are trustees and beneficiaries there must also be a trust of some kind.[69] Says the Illinois court: "By the election which organized the corporation the title became vested in the trustees and their successors for the use

[59] Munson v. Bringe, 146 Wis. 393, 131 N. W. 904; Robertson v. Rock Island Lumber Co., 74 Kans. 117, 85 Pac. 799, 87 Pac. 1134; Trustees v. Laird, (Del. Ch. 1913) 85 Atl. 1082.

[60] People v. Runkle, 9 Johns. 147.

[61] Morgan v. Rose, 22 N. J. Eq. 583; Page v. Asbury M. E. Church, 78 N. J. Eq. 114, 78 Atl. 246.

[62] Worrell v. First Presbyterian Church, 23 N. J. Eq. 96; Bridges v. Wilson, 58 Tenn. 458.

[63] North Carolina Christian Conference v. Allen, 156 N. C. 524, 72 S. E. 617, 618.

[64] Presbytery of Jersey City v. Weehawken First Presbyterian Church, 80 N. J. L. 572, 78 Atl. 207.

[65] Kniskern v. Lutheran Churches, 1 Sandf. Ch. (N. Y.) 439; In re St. George Lithuanian Church, (Pa. 1914) 90 Atl. 918; Bates v. Houston, 66 Ga. 198.

[66] East Haddam Baptist Church v. East Haddam Baptist Society, 44 Conn. 259; Holmes v. Trustees of Wesley M. E. Church, 58 N. J. Eq. 327, 42 Atl. 582.

[67] Wiswell v. First Congregational Church, 14 Oh. St. 31.

[68] Trustees v. Laird, (Del. Ch. 1913) 85 Atl. 1082.

[69] Trustees v. Laird, (Del. Ch. 1913) 85 Atl. 1082; Munson v. Bringe, 146 Wis. 393, 131 N. W. 904.

of the trust as completely as if the use had been declared by deed."[70] Where there was an express provision in the deed the trust of course was quite easily determined. Where the society was of the connectional kind, acknowledging some synod or similar body as a superior, the question was also comparatively simple. But where the title was acquired by an independent society under an absolute deed from a grantor who thought of nothing but perhaps the money realized by the sale, the question became very difficult. The only criterion that remained was the religious opinions of the associates at the time of the grant,[71] which accordingly was seized upon by the courts.

It must be obvious upon the slightest reflection that such a trust was but a "vague charitable use"[72] and that the problem of discovering and preserving it assumed gigantic proportions. A vast field for judicial inquiry was thrown open, difficult enough where the property had but recently been acquired, but presenting almost insurmountable obstacles where any considerable period had elapsed. Evidence, which in its nature was extremely vague while fresh, certainly did not gain definiteness by age. The problem of discovering the collective faith of a number of persons was difficult enough if all these persons could be subpoenaed into the court. Where, however, many, if not all of them, were dead and gone, it might be utterly impossible to discover their opinion and the trust resting on it. Courts were thus asked to stultify themselves by an inquiry which was hopeless.

Another unexpected evil developed by the trustee corporation theory was that church property without any express exemption was held to be execution-proof. If judgment was recovered against the corporation an execution became useless since it held only the legal title. The creditor, however good his claim, was without remedy, even if he was able to recover judgment.[73] But even this slight consolation was denied him. It was held that the trustees had no power to contract debts. If they did, the creditor, unless he by some chance could hold the individual trustees, was helpless.[74] The spectacle of a church, a moral agent, evading its just debts on a technicality, is certainly not very elevating. Yet such result, while not general, was always within the range of possibility and was occasionally realized.

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[70] Brunnenmeyer v. Buhre, 32 Ill. 183, 190.

[71] Wilson v. Livingston, 99 Mich. 594, p. 603.

[72] Ackley v. Irwin, 130 N Y. Supp. 841, 71 Misc. 239.

[73] Lord v. Hardie, 82 N. C. 241, 33 Am. Rep. 683.

[74] Bailey v. M. E. Church of Freeport, 71 Me. 472. This was a case of a quasi corporation organized however like the typical trustee corporation.

These evils at last led to an abrogation of this particular theory of religious corporations in a number of states, not by legislative action, but rather by judicial legislation. The New York courts served as pioneers. After struggling till 1850 under an ever-increasing mass of intricate trust questions growing out of the relation of the society and the corporation, they at last overthrew the entire theory and eliminated all its consequences by adopting another construction of their religious incorporation act. This act was not drawn with a clear perception of the consequences of the trustee corporation theory. It referred in some places to the members of the societies as corporators. These provisions were taken hold of by the court. Support for the new construction was found in the language of some of the previous cases in which society members were similarly referred to. The corporate franchise was extended to all the members of the society and the trustees from exclusive corporators were reduced to mere officers of the corporation. The distinction between society and corporation was abolished, so that churches henceforth presented only a twofold aspect (church and corporation) instead of a threefold aspect (church, society, and corporation).[75] It followed, since the trustees, though still called such, were in fact only officers, that there was no trust relation between them and their associates. The entire theory of an implied trust was thus brought down in a crumbling mass by one blow.[76] The New York courts and others who followed in their wake were henceforth relieved from a class of litigation which was not only highly unprofitable to the litigants but also intensely vexing to the courts. This brings us to the consideration of the highest form of religious corporation.

5. *The Corporation Aggregate.*

This form of church corporation is so simple that it does not require much space to elucidate it. "Religious incorporations are aggregate corporations, and whatever property they possess or acquire is vested in the body corporate. It is true the officers have it under their control or dominion, but their possession is the possession of the artificial person whose agents they are. Although called trustees they do not hold the property in trust. Their right to intermeddle with or manage the property is an authority, and not an estate or title. They have no other or greater possession than the

[75] Robertson v. Bullions, 9 Barb. 64 (affirmed 11 N. Y. 243); People v. Fulton, 11 N. Y. 94; Hundley v. Collins, 131 Ala. 234, 32 So. 575, 90 Am. St. Rep. 33; Wheelock v. First Presbyterian Church, 119 Cal. 477, 51 Pac. 841.

[76] Petty v. Tooker, 21 N. Y. 267, 270.

directors of a bank in a banking establishment. The whole title or estate is vested in the incorporated body and the corporation is the proper party to sue."[77] The church members are corporators and may in a body as a church provide rules and regulations for the election, government and removal of the trustees.[78]

It follows that trustees "do not hold the property in the absence of a declared or at least clearly implied trust, for any church in general, nor for the benefit of any peculiar doctrines or tenets of faith and practice in religious matters, but solely for the society or congregation whose officers they are."[79] By whatever name they may be known they will act under the direction of the corporation of which they are officers,[80] and not under the direction of the courts.[81] Their discretion is similar to the discretion vested in the board of directors of any other corporation.[82] While it is their duty to act with due regard to the feelings of the members of the corporation,[83] they may do many things, such as mortgage the church property, without any express consent on the part of such members.[84] While they cannot turn the corporate property over to another body[85] they are entitled to the control over it against any unauthorized act of their fellow corporators.[86]

While the superiority of the corporation aggregate over the trustee corporation is obvious it must not for a moment be supposed that the trustee corporation has been eliminated from the American law. It is too well adapted to the purposes of non-congregational churches to be completely overthrown, whatever its defects. Churches like the Catholic and Episcopal cannot well adapt themselves to the new theory. Courts will adopt "such a view of the law as will permit religious bodies to be incorporated, and yet preserve their original form of church government, instead of revolutionizing it from a hierarchical or synodical into a congregational form."[87]

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[77] North St. Louis Christian Church v. McGowan, 62 Mo. 279, 288.

[78] Fort v. First Baptist Church of Paris, (Tex. Civ. App. 1899) 55 S. W. 402.

[79] Calkins v. Cheney, 92 Ill. 463, 477.

[80] Sanchez v. Grace M. E. Church, 114 Cal. 295, 46 Pac. 2.

[81] Robertson v. Bullions, 9 Barb. 64 (affirmed 11 N. Y. 243); Attorney General v. Geerlings, 55 Mich. 562, 22 N. W. 89.

[82] People's Bank v. St. Anthony's Roman Catholic Church, 39 Hun. 498, affirmed in 109 N. Y. 512, 17 N. E. 408, 16 Am. St. Rep. 856.

[83] Wyatt v. Benson, 23 Barb. 327.

[84] In re St. Ann's Church, 14 Abb. Prac. 424, 23 How. Prac. 285.

[85] Kenton Union Sunday School Association v. Espy, 17 O. Cir. Ct. R. 524, 9 O. C. D. 695.

[86] First M. E. Church v. Filkins, 3 Thomp. & C. (N. Y.) 279.

[87] Klix v. Polish Roman Cath. St. Stanislaus Parish, 137 Mo. App. 347, 118 S. W. 1171.

Furthermore the trustee corporation is better adapted than the corporation aggregate to the purpose of incorporating synods and similar bodies, whose membership is very large and spreads over a vast area. So also where universities and colleges are supported by large church bodies these institutions are quite generally incorporated under the trustee corporation plan. The trustee corporation is thus, to some extent, still recognized in all the states, even in those that have taken the most advanced position in adopting the other theory.

No attempt will be made to classify the various states according to the theories adopted by them. The statutes in regard to religious corporations are quite frequently ambiguous and the judicial utterances are more or less vacillating between the two theories. The same court will be found to adopt now one theory, now another. Occasionally opinions are even found which adopt both, or which are written in such a way that it is impossible to say which theory is favored by the court.

Nor do all courts which adopt the aggregate theory carry it to its logical conclusion. Many still hold on to the doctrine of implied trust, though they remove the only foundation on which it rests. The whole subject, on account of changes in and ambiguity of the statutes, and owing to the uncertain tone of many decisions, is in quite an unsatisfactory state. The statutes of any particular state and the decisions construing them must be examined with great care to determine whether or not particular trustees are merely officers accountable to the corporation or holders of the legal title accountable to the courts. The aggregate theory, having come into the field only in 1850 after many states had already committed themselves to the trustee theory, has had an uphill fight and appears to be still in the minority when a poll of the various states is taken.

It goes without saying that the question whether a particular church corporation is a trustee or aggregate corporation must be solved by counsel at the threshold of every lawsuit involving a church corporation. Cases have been lost because the pleader has attempted to sue the church direct instead of suing its trustees.[88] It has been held, however, that such a mistake is the subject of an amendment in the court below,[89] while still other courts hold that it is a matter of no significance whether the one or the other form is adopted.[90]

[88] Ada St. M. E. Ch. v. Garnsey, 66 Ill. 132; Drumheller v. First Universalist Ch., 45 Ind. 275; Gaff v. Greer, 88 Ind. 122.

[89] Trustees of First Baptist Society in Syracuse v. Robinson, 21 N. Y. 234.

[90] Davis v. Bradford, 58 N. H. 476.

It is apparent from the foregoing that there are three forms of church corporations in full bloom in the states of the Union. Of these the corporation sole serves the necessities of those churches who believe in vesting their bishops or similar dignitaries with large discretion in matters of property. The trustee corporation is adapted to the needs of those churches who are somewhat more democratic without being congregational, while the aggregate corporation represents the triumph of democratic government in church affairs and is a splendid fit for those churches which vest the complete control of church property directly in the congregations. It remains to say a few words concerning a class of corporations which may assume any of the forms above mentioned and which is recognized in a number of states.

6. *The Quasi Corporation.*

The quasi corporation must not be confounded with the *de facto* corporation. A *de facto* corporation requires two things, 1. a law under which a *de jure* corporation might be organized, 2. an attempt, however abortive, to organize under it and to use corporate powers. As against all persons but the state such a *de facto* corporation is just as good as a corporation *de jure*. A quasi corporation, on the other hand, is a body recognized by the law as a corporation, but only for some special limited purpose, such as taking property.

While the procedure by which churches are incorporated is extremely simple and inexpensive, many churches for one reason or another do not see fit to acquire corporate rights. It happens that some testator devises or bequeathes property to them in the name by which they are generally known. The validity of this gift is at once brought into question. Many such donations have been declared void by the courts. This was felt as an evil and the legislatures were appealed to for a remedy. The remedy applied was to declare all such bodies corporations for the purpose of taking property. Such statutes were passed even before the revolution. Thus the Pennsylvania statute creating such quasi corporations dates back to 1731,[91] while Maryland followed in 1779,[92] Massachusetts in 1811,[93] and Vermont in 1814.[94] Similar statutes have been passed in

[91] Phipps v. Jones, 20 Pa. 260, 59 Am. Dec. 708; Kracuzunas v. Hoban, 221 Pa. 213, 70 Atl. 740.

[92] Bartlett v. Hipkins, 76 Md. 5, 25, 23 Atl. 1089, 24 Atl. 532.

[93] Christian Society in Plymouth v. Macomber, 46 Mass. (5 Met.) 155; Hamblett v. Bennett, 88 Mass. (6 Allen) 140; Glendale Union Christian Society v. Brown, 109 Mass. 163; First Baptist Ch. of Sharon v. Harper, 191 Mass. 196, 77 N. E. 778.

[94] M. E. Society v. Lake, 51 Vt. 353; Horton's Executor v. Baptist Church and Society in Chester, 34 Vt. 309.

New Hampshire, North Carolina, and Tennessee,[95] and other states, while in Michigan religious societies will receive recognition only after exercising corporate functions for ten years.[96]

The doctrine illustrates the extreme liberality with which American churches are treated by the lawmaking power. Though such bodies have done nothing but organize according to the rules of their church, though corporate existence was far removed from their thoughts, the law, for their own protection, invests them with corporate rights for which they have expressed no desire.

It must not however be supposed that all states have such statutes. In some states no request has ever been made for such a statute and none has been enacted. It will therefore be well where congregations are organized, not to rely on such statutes, but to acquire full corporate powers by a due compliance with the simple provisions of the religious corporation acts.

To sum up: The two original forms of American church corporations, namely the territorial parish and the corporation sole, were public municipal corporations developed before the revolution as part of the religious establishment then in vogue. They have passed away with that establishment, the territorial parish absolutely, the corporation sole in its original form. In their place have grown up three forms of private religious corporations, namely the corporation aggregate, the trustee corporation and the modern form of the corporation sole. Of these, the corporation aggregate fills the needs of churches with a congregational form of government, while the corporation sole serves the necessities of churches whose form of government is episcopal. For such churches as occupy an intermediate position, the trustee corporation presents the ideal means of corporate existence. In addition to these forms the Roman Catholic Church is recognized as a corporation in our insular possessions by virtue of the treaty of 1898 with Spain, while unincorporated church societies are in some states by virtue of a statute recognized as quasi corporations.

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[95] Bean v. Christian Church, 61 N. H. 260; Lord v. Hardie, 82 N. C. 241, 33 Am. Rep. 683; Rhodes v. Rhodes, 88 Tenn. 637, 13 S. W. 590; Nance v. Busby, 91 Tenn. 303, 18 S. W. 874, 15 L. R. A. 801; see also cases cited in note 32.

[96] First Ev. Luth. Church of Dearborn v. Rechlin, 49 Mich. 515, 14 N. W. 502; Congregational Church of Ionia v. Webber, 54 Mich. 571, 20 N. W. 542.